No. 16,468

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK A. LEMON and MARTIN de BRUIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal No. 11,279.

APPELLEE'S ANSWERING BRIEF.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
By HARRY W. DUDLEY,
Assistant United States Attorney,
District of Hawaii,
Honolulu, Hawaii,
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

No. 16,468

IN THE

United States Court of Appeals

For the Ninth Circuit

JACK A. LEMON and MARTIN de BRUIN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal No. 11,279.

APPELLEE'S ANSWERING BRIEF.

STATEMENT OF THE CASE.

Appellants were charged with devising an intending to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises and with using the mails for the purpose of executing said scheme and artifice and attempting to do so.

Appellants state in their opening brief, at page 5:

> "... It is undisputed that the United States mail was used as a medium of distributing the check-books and hence if the evidence adduced at the trial fairly shows a scheme to defraud, then the verdict of the jury and the judgment and sentence

of the trial Court must be upheld. The sole question remaining is whether such evidence was presented at the trial below."

ARGUMENT.

THE EVIDENCE WAS SUFFICIENT TO GO TO THE JURY AND IS SUFFICIENT TO SUSTAIN THE VERDICT.

Inasmuch as the same basic question is involved, both specifications of error will be considered together.

There is no limit to the ingenuity of the human mind in formulating schemes to defraud. In *Wells v. Zenz* (1927), 83 Cal. App. 137, 256 Pac. 484, 485, the California District Court of Appeal stated:

> "Fraud is a generic term which embraces all the multifarious means which human ingenuity can devise and are resorted to by one individual to get an advantage over another. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and unfair ways by which another is deceived."

It is submitted that, considering the evidence in the light most favorable to the prosecution (*Buford v. United States* (November 2, 1959), 9th Cir., Advance Sheets, No. 16,405) the evidence adduced fairly shows a scheme by appellants to defraud. The scheme in this case was based on a simple proposition: to create false impressions and to thereby extract a few dollars from many individual members of the public. The basic idea itself is surrounded by an aura of dishonesty.

It was stipulated that appellants were the owners and operators of "Honolulu Customers Checkbook". (R. 119, 120.)

The first step in the scheme was to obtain from merchants agreements that they would honor a certain number of cards or coupons which would be distributed by appellants. Such agreements were obtained from George Oka, owner and operator of George's Shell Service (Plaintiff's Exhibit 2, R. 34), Raymond Y. Muramoto, operator of Ray's Shell Service (Defendants' Exhibit B, R. 48), Grace Studebaker, manager of Arthur Murray Studio (Defendants' Exhibit D, R. 52), Al Karasick, sports promoter (Plaintiff's Exhibit 4, R. 54), and Satoshi Furuya, manager of the Nippon Theater (Defendants' Exhibit G, R. 60), among others. It is obvious from the coupons in evidence that such agreements were obtained from others as well.

The agreements in evidence provided that Customers Checkbook would pay all of the advertising costs on radio, television and in newspapers. Appellants did not state in the agreements in evidence that the telephone would be used for solicitation.[1] Oka testified he did not know that appellants were going to use the telephone until customers told him of it and that it made a difference in his mind whether he had been told that they were going to do so. (R. 38.) Muramoto testified that de Bruin did not say anything about selling the Customers Checkbook by

[1]See footnote 3 post.

telephone (R. 47), Studebaker testified that appellants did not tell her that they would use telephone solicitation and that she cared whether the telephone was used because she did her own telephone solicitation (R. 52), and Furuya testified that appellants told him that the checkbook was to be sold by house to house campaign and that they did not say anything to him about telephone solicitation. (R. 59, 60.)

Thus, appellants misled said merchants into believing that the telephone was not to be used in distributing the cards and coupon books.

The second step in the scheme was to prepare a sales pitch designed to mislead, and hire girls to telephone persons listed in the telephone directory.

The evidence shows that Plaintiff's Exhibit No. 1 was given over the telephone. (R. 32, 33.) In that sales pitch, the caller stated: "This is George's Shell Service calling . . ." (R. 34.) This was untrue. Oka, the owner of George's Shell Service, testified that none of his employees read this script on the telephone and that he had never authorized anybody to read it on the telephone. (R. 36.)

The sales pitches given by telephone (Plaintiff's Exhibits Nos. 1, 5, 5A, R. 33, 34, 68, 71), were calculated to convey false impressions to the persons called. In stating to the persons called: "If you can answer the following question correctly, you will have the opportunity to receive a George's Shell Service card worth over $50.00 in useful car service," (R. 34) and "If you can answer the following question cor-

rectly you will have the opportunity to receive a customer's checkbook worth over $50.00 in useful car services, entertainment, tickets and free gifts," (R. 69), then listing certain "free" items and stating that they were only a few of the many wonderful values offered (R. 70), it was intended to convey the false impressions that because of his ability to answer a question correctly the person called thereby became entitled to free items and that all of the items were free without the necessity of the person's having to spend any money to obtain them.

The deception was accomplished. Nancy Nozawa testified that she was told it was a contest and that she would receive some valuable merchandise. (R. 93, 96.) She also testified that she was told that she had won some things. (R. 99.) Clayton C. Holloway testified that he was told he would win over $50.00 free gifts and merchandise and that he had won them. (R. 103.) Lieselotte K. Kahookele testified that she was told that she had received free gifts (R. 106) and that she did not have to buy anything. (R. 108.) Robert Enomoto testified that he was told that if he answered the question correctly he would receive merchandise worth over $60.00. (R. 109.)

The evidence shows, without dispute, that many persons, including those hereinabove named, purchased the cards and books sent to them C.O.D. by appellants. (R. 94, 95, 103, 107, 109, 110, 112, 113, 114, 122.)

It was represented that the person called would received 75 free gallons of gasoline. (Plaintiff's Exhibit No. 1, R. 35.) The card so provided. (Defend-

ants' Exhibit A, R. 38.) The George's Shell Service card was good for three months.[2] The buyer of the card was entitled to five free gallons of gasoline with every 48 gallons purchased. To get 75 gallons free, he would have to buy 48 gallons 15 times in three months, a total of 720 gallons. To this must be added 70 gallons. The last five gallons could remain in the tank. Therefore, within three months he would have to use 790 gallons. To do so, a driver whose car averages 13 miles per gallon would have to drive 10,270 miles in three months, an average of approximately 114 miles per day. Very few drivers in California average 10,270 miles in three months. This Court can take judicial notice that the island of Oahu, on which Honolulu is located, is 42½ miles long and 31½ miles wide at its widest point. (*Davis v. United States* (1950), 9th Cir., 185 Fed. (2d) 938, 944; *Kishan Singh v. Carr* (1937), 9th Cir., 88 Fed. (2d) 672, 675; Coast and Geodetic Survey Chart No. 4110.) It is apparent that an ordinary driver would average considerably less than 114 miles per day on the island of Oahu.

The Stauffer System coupon provides for $7.00 in free treatments and a professional figure analysis. Ramona Arkin, manager of the Stauffer Salon, testified that they always offer one free trial and figure analysis (R. 27) and that ordinarily one treatment would be $3.50. (R. 30.) The Arthur Murray coupon provides for two free dance lessons or $15.00 credit on original course. Grace Studebaker, manager of the

---

[2]See footnote 3 post.

Arthur Murray Studio, testified that anyone who comes into the studio gets a half-hour free lesson, dance analysis. (R. 51.) The Surf & Shore coupon provides for $1.00 credit on any purchase over $10.00. Betty Mitchell, the operator of the Surf & Shore Shop, testified that they always give $1.00 off after a customer has spent $10.00. (R. 58.) An Ala Wai Boat Rental coupon provides for a free ten minute boat ride. How valuable can that be? Another provides for 25% discount on boat rides on certain days. The Bargain Sales coupon provides for one free Benrus watch with the purchase of a Benrus watch of equal value. The Lippy Espinda coupon provides for a free chassis lubrication with the purchase of an oil change. The Ace Motors coupons provide for various amounts of free gasoline on the purchase of automobiles for over various prices. The King Street Car Wash coupons provide for discounts on car washes.[3]

Thus, many of the items mentioned were not free in the sense that the buyers were led to believe them to be. Also, the buyers were entitled to some of the other items without coupons.

---

[3]The Assistant United States Attorney who tried this case is no longer in this office. The original exhibits are in the office of Clerk of this Court. The writer of this brief had available a George's Shell Service card, several coupon books and a form of agreement with merchants, but could not compare them with those in evidence. From a conversation with said former Assistant United States Attorney, the writer believes that the statements as to what the card provided and as to the period it was good for are correct, that the various coupons mentioned are in evidence and contain the provisions mentioned, and that all the agreements mentioned provided that Customers Checkbook would pay all of the advertising costs on radio, television and in newspapers and did not provide that the telephone would be used.

In addition to wording the sales pitches to deceive, appellants knew that they were deceiving. Verna May Chung testified that the telephone girls were instructed to have appellant, Lemon, or Virginia handle complaints and that later they were instructed to leave the phones off the hook after they had finished calling the customers each day and later, when there were many complaints, to say, in pidgin language, "I am just the janitress and I don't understand." (R. 76, 77.)

From June 2, 1958 to June 17, 1958, 4208 items were mailed by appellants. (R. 119.)

Appellants complain that the trial Court erred in denying their motion for acquittal. In *Crawley v. United States* (1959), 4th Cir., 268 Fed. (2d) 808, the Court said at pages 811 and 812:

> "The question is not whether the evidence forecloses all possibility of doubt in the mind of the court, but merely whether the evidence, construed most favorably for the prosecution, is such that a jury might find the defendant guilty beyond a reasonable doubt. Bell v. United States, 4 Cir., 185 F. 2d 302; United States v. Brown, 2 Cir., 236 F.2d 403; Stoppelli v. United States, 9 Cir., 183 F.2d 391. Judge Soper, speaking for this Court in the Bell case said of our duty of appraising the sufficiency of the evidence (185 F.2d 310):
>
> > '* * * That responsibility does not include a finding as to whether the defendant is guilty beyond a reasonable doubt. When a motion for a directed verdict of acquittal is made in a criminal case, the sole duty of the trial judge

> is to determine whether there is substantial evidence which, taken in the light most favorable to the United States, tends to show that the defendant is guilty beyond a reasonable doubt. The possibility that a jury may have a reasonable doubt upon the evidence as to the guilt of the defendant is not the criterion which determines the action of the trial judge. The decision on that question is for the jury to make and the rule is the same whether the evidence is direct or circumstantial. . . .' "

It is apparent that the evidence adduced prior to the motion for acquittal meets the test. At the very least, it tended to show that the appellants were guilty beyond a reasonable doubt. It at least tended to show a scheme calculated to deceive and the payment by those deceived of money for something other than they were led to believe they were obtaining.

Antone Youn, owner of Tony's T.V. and Radio Service, testified for appellants. His coupon provided for a free TV service call, $5.00 value. He testified that if he had a call from Kaneohe, he would charge $5.00 in addition to the coupon. (R. 129.) It is obvious that Kaneohe is some distance from Honolulu.

Appellants' witness, Sam Price made some illuminating statements. He testified that ". . . in all these something for nothing deals, you never really get something for nothing. What it amounts to is a sales stimulant. You are going to get a certain number of customers that are not happy with it," (R. 148), and "A lot of people are quite naive." (R. 150.)

Appellants also complain that the trial Court erred in failing to rule that the evidence was insufficient to support a verdict of guilty. They argue that the technique used could not have deceived any except the most gullible. (Appellants' Opening Brief, p. 9.)

The law protects the gullible as well as the skeptical.

It is respectfully submitted that the evidence adduced prior to the motion for acquittal was sufficient to go to the jury and that the entire evidence was sufficient for the jury to find beyond a reasonable doubt that appellants were guilty of the offenses charged.

CONCLUSION.

It is respectfully submitted that the judgment should be affirmed.

Dated, Honolulu, Hawaii,
November 20, 1959.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
By HARRY W. DUDLEY,
Assistant United States Attorney,
District of Hawaii,
Attorneys for Appellee.